

Oct 24, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

LORRY A. W.

Plaintiff,

vs.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 1:19-CV-03082-LRS

**ORDER GRANTING
PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT,
*INTER ALIA***

BEFORE THE COURT are the Plaintiff's Motion For Summary Judgment (ECF No. 13) and the Defendant's Motion For Summary Judgment (ECF No. 14).

JURISDICTION

Lorry A. W., Plaintiff, applied for Title II Social Security Disability Insurance benefits (SSDI) and Title XVI Supplemental Security Income benefits (SSI) on November 24, 2015. The applications were denied initially and on reconsideration. Plaintiff timely requested a hearing which was held on March 8, 2018, before Administrative Law Judge (ALJ) Timothy Mangrum. Plaintiff testified at the hearing, as did Vocational Expert (VE) Abbe May. On August 1, 2018, the ALJ issued a decision finding the Plaintiff not disabled. The Appeals Council denied a request for review of the ALJ's decision, making that decision the Commissioner's final decision subject to judicial review. The Commissioner's final decision is appealable to district court pursuant to 42 U.S.C. §405(g) and §1383(c)(3).

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 1**

STATEMENT OF FACTS

The facts have been presented in the administrative transcript, the ALJ's decision, the Plaintiff's and Defendant's briefs, and will only be summarized here. Plaintiff has a GED and past relevant work experience as a kitchen helper, preschool substitute teacher, and retail clerk. She alleges a closed period of disability from September 1, 2015 to July 4, 2017. Plaintiff was 49 years old on September 1, 2015 and 51 years old on July 4, 2017. Plaintiff's date last insured for Title II SSDI benefits is December 31, 2020.

STANDARD OF REVIEW

"The [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are supported by substantial evidence...." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir. 1988). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401, 91 S.Ct. 1420 (1971). "[S]uch inferences and conclusions as the [Commissioner] may reasonably draw from the evidence" will also be upheld. *Beane v. Richardson*, 457 F.2d 758, 759 (9th Cir. 1972); *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989); *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982).

It is the role of the trier of fact, not this court to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court must uphold the decision of the ALJ. *Allen v. Heckler*, 749

ORDER GRANTING PLAINTIFF'S

MOTION FOR SUMMARY JUDGMENT- 2

1 F.2d 577, 579 (9th Cir. 1984).

2 A decision supported by substantial evidence will still be set aside if the proper
3 legal standards were not applied in weighing the evidence and making the decision.
4 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir.
5 1987).

7 ISSUES

8 Plaintiff argues the ALJ erred in: 1) improperly assessing the medical opinion
9 evidence; 2) failing to provide specific, clear and convincing reasons for discounting
10 Plaintiff's testimony regarding her symptoms and limitations; and 3) failing to
11 conduct an adequate analysis at Step Four regarding Plaintiff's ability to perform past
12 relevant work.

14 DISCUSSION

15 SEQUENTIAL EVALUATION PROCESS

16 The Social Security Act defines "disability" as the "inability to engage in any
17 substantial gainful activity by reason of any medically determinable physical or
18 mental impairment which can be expected to result in death or which has lasted or can
19 be expected to last for a continuous period of not less than twelve months." 42
20 U.S.C. § 423(d)(1)(A) and § 1382c(a)(3)(A). The Act also provides that a claimant
21 shall be determined to be under a disability only if her impairments are of such
22 severity that the claimant is not only unable to do her previous work but cannot,
23 considering her age, education and work experiences, engage in any other substantial
24 gainful work which exists in the national economy. *Id.*

25 The Commissioner has established a five-step sequential evaluation process for
26 determining whether a person is disabled. 20 C.F.R. §§ 404.1520 and 416.920;
27 *Bowen v. Yuckert*, 482 U.S. 137, 140-42, 107 S.Ct. 2287 (1987). Step one determines
28

ORDER GRANTING PLAINTIFF'S

MOTION FOR SUMMARY JUDGMENT- 3

1 if she is engaged in substantial gainful activities. If she is, benefits are denied. 20
2 C.F.R. §§ 404.1520(a)(4)(i) and 416.920(a)(4)(i). If she is not, the decision-maker
3 proceeds to step two, which determines whether the claimant has a medically severe
4 impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii) and
5 416.920(a)(4)(ii). If the claimant does not have a severe impairment or combination
6 of impairments, the disability claim is denied. If the impairment is severe, the
7 evaluation proceeds to the third step, which compares the claimant's impairment with
8 a number of listed impairments acknowledged by the Commissioner to be so severe
9 as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(iii) and
10 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpart P, App. 1. If the impairment meets or
11 equals one of the listed impairments, the claimant is conclusively presumed to be
12 disabled. If the impairment is not one conclusively presumed to be disabling, the
13 evaluation proceeds to the fourth step which determines whether the impairment
14 prevents the claimant from performing work she has performed in the past. If the
15 claimant is able to perform her previous work, she is not disabled. 20 C.F.R. §§
16 404.1520(a)(4)(iv) and 416.920(a)(4)(iv). If the claimant cannot perform this work,
17 the fifth and final step in the process determines whether she is able to perform other
18 work in the national economy in view of her age, education and work experience. 20
19 C.F.R. §§ 404.1520(a)(4)(v) and 416.920(a)(4)(v).

20 The initial burden of proof rests upon the claimant to establish a prima facie
21 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
22 Cir. 1971). The initial burden is met once a claimant establishes that a physical or
23 mental impairment prevents her from engaging in her previous occupation. The
24 burden then shifts to the Commissioner to show (1) that the claimant can perform
25 other substantial gainful activity and (2) that a "significant number of jobs exist in the
26 national economy" which claimant can perform. *Kail v. Heckler*, 722 F.2d 1496,
27 1498 (9th Cir. 1984).

28
**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 4**

ALJ'S FINDINGS

The ALJ found the following:

1) Plaintiff has the following “severe” medically determinable impairments: degenerative disc disease and anxiety;

2) Plaintiff’s impairments do not meet or equal any of the impairments listed in 20 C.F.R. § 404 Subpart P, App. 1;

3) Plaintiff has the Residual Functional Capacity (RFC) to perform light work as defined in 20 C.F.R. §§ 404.1567(b) and 416.967(b), except that she is limited to frequent handling and fingering with the right upper extremity; she can perform occasional postural activity; she should avoid concentrated exposure to hazards and vibrations; and she would be off task less than 10% of the workday;

4) Plaintiff’s RFC allows her to perform her past relevant work as a kitchen helper, preschool substitute teacher, and retail clerk.

Accordingly, the ALJ concluded that Plaintiff is not disabled.

MEDICAL OPINIONS

It is settled law in the Ninth Circuit that in a disability proceeding, the opinion of a licensed treating or examining physician or psychologist is given special weight because of his/her familiarity with the claimant and his/her condition. If the treating or examining physician's or psychologist’s opinion is not contradicted, it can be rejected only for clear and convincing reasons. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). If contradicted, the ALJ may reject the opinion if specific, legitimate reasons that are supported by substantial evidence are given. *Id.* “[W]hen evaluating conflicting medical opinions, an ALJ need not accept the opinion of a doctor if that opinion is brief, conclusory, and inadequately supported by clinical findings.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). The opinion of a non-examining medical advisor/expert need

ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT- 5

1 not be discounted and may serve as substantial evidence when it is supported by other
2 evidence in the record and consistent with the other evidence. *Andrews v. Shalala*,
3 53 F.3d 1035, 1041 (9th Cir. 1995).

4 Nurse practitioners, physicians' assistants, and therapists (physical and mental
5 health) are not "acceptable medical sources" for the purpose of establishing if a
6 claimant has a medically determinable impairment. 20 C.F.R. §§ 404.1513(a);
7 416.913(a). Their opinions are, however, relevant to show the severity of an
8 impairment and how it affects a claimant's ability to work. 20 C.F.R. §§ 404.1513(d);
9 416.913(d). In order to discount the opinion of a non-acceptable medical source, the
10 ALJ must offer germane reasons for doing so. *Turner v. Comm'r of Soc. Sec.*, 613
11 F.3d 1217, 1224 (9th Cir. 2010).¹

12 It appears Plaintiff first saw Amy Turner, PA-C, in November 2014. Plaintiff
13 reported control of her depression anxiety symptoms and was only taking half of her
14 clonazepam tablets once per month when she was feeling very anxious. She was not
15 exercising because of chronic low back pain. (AR at p. 283). In May 2015, Plaintiff
16 saw Turner for "worsening back pain, mostly over the right thoracic area." (AR at
17 p. 288). In July 2015, Turner referred the Plaintiff for physical therapy regarding her
18 "[c]hronic, intermittent thoracic back pain." (AR at p. 296). Turner provided the
19 Plaintiff with a note so she could rest for the next week and not have to lift in excess
20 of 10 pounds in her job as a kitchen assistant. (*Id.*). Plaintiff underwent a physical
21 therapy assessment in late August of 2015. Plaintiff's pain increased with left side
22 bending, right rotation, and a little with extension. Palpation of Plaintiff's muscles
23 revealed taut bands and trigger points in the thoracic paraspinal muscles from T7
24 through T12. (AR at p. 298).

25
26 ¹ For claims filed on or after March 27, 2017, physician assistants are now
27 considered "acceptable medical sources." 82 Fed. Reg. 5844 (Jan. 18, 2017).

1 In January 2016, Turner addressed Plaintiff's "history of generalized anxiety
2 disorder," in addition to her chronic back pain. (AR at p. 306). Turner noted that
3 Plaintiff had been on Paxil for years and "takes clonazepam very sparingly only as
4 needed for severe anxiety/panic attacks . . . about 4 times per month." (*Id.*). Turner
5 further noted that Plaintiff had started a new job three weeks ago and was working
6 in retail. (*Id.*). Plaintiff was taking ibuprofen consistently for her back pain. (*Id.*).
7 Plaintiff expressed a fear of driving and had placed a call to Catholic Family and
8 Child Services to start therapy for her anxiety. (AR at p. 307).

9 In March 2016, Plaintiff reported to Turner that she had a severe panic attack
10 over a weekend and called emergency medical services, but did not go to the hospital
11 Plaintiff indicated she was experiencing increasing panic attacks, requiring her to take
12 clonazepam five times in the past couple weeks, and that she was having trouble
13 sleeping due to anxiety. (AR at p. 308).

14 In April 2016, Plaintiff reported to Turner that she was experiencing three
15 panic attacks a week, with her anxiety being most pronounced around driving and at
16 bedtime. (AR at p. 309).

17 As early as November 2014, Plaintiff was seen at Water's Edge Pain Clinic for
18 back pain. (AR at p. 389). Plaintiff had a sacroiliac joint injection in April 2015.
19 (AR at p. 331) and lumbar transforaminal epidural steroid injections in August and
20 October 2016 (AR at pp. 476 and 482). Plaintiff was seen at the pain clinic at various
21 times from 2014 to 2017 by Juan Ruiz Hurtarte, M.D., for chronic thoracic back and
22 sacroiliac pain. (AR at pp. 357-59; 373-391; 476-492; 623-639).² In November 2016
23

24 ² Some of Dr. Hurtarte's notes indicate that Plaintiff denied any impairment
25 in driving. (AR at pp. 480, 486 and 490). It is not clear, however, if Plaintiff was
26 only denying impairment as a result of back problems, as opposed to anxiety
27
28

1 and again in January and March 2017, Dr. Hurtarte noted that Plaintiff consistently
2 tested high for anxiety and depression and recommended Plaintiff be treated for these
3 issues. (AR at pp. 627; 630-31; 634). In April 2017, Plaintiff underwent a health
4 and behavior assessment at the pain clinic. (AR at pp. 640-43).

5 In January 2017, Plaintiff returned to see PA-C Turner requesting her to “fill
6 out paperwork for temporary versus permanent disability secondary to chronic back
7 and neck pain.” (AR at p. 646). Turner noted that Plaintiff had been followed at
8 Water’s Edge for her pain; three injections had been tried and failed; over the counter
9 medicines had failed as had meloxicam; and Plaintiff had recently been prescribed
10 diclofenac without much improvement. (AR at p. 646). Plaintiff reported her pain
11 was more severe with sitting or standing for prolonged periods of time and she
12 needed to change positions frequently. (*Id.*). She also reported that lifting in excess
13 of ten pounds repetitively could be painful. (*Id.*).

14 PA-C Turner completed a “Medical Report” at that time in which she opined
15 Plaintiff had the ability to lift and carry 10 pounds on an occasional basis; the ability
16 to lift and carry less than 10 pounds on a frequent basis; the ability to stand and walk

17
18
19 problems. Moreover, the ALJ did not cite this as a reason for discounting
20 Plaintiff’s testimony about her mental health symptoms and limitations.

21
22 There was almost a year’s gap in Plaintiff’s treatment at the pain clinic, as
23 noted by Dr. Hurtarte. (AR at p. 489). No explanation was offered for this, but
24 this was not a reason cited by the ALJ for discounting Plaintiff’s testimony about
25 her physical symptoms and limitations. Indeed, the ALJ’s decision makes no
26 mention of Dr. Hurtarte’s treatment of Plaintiff.

27
28 **ORDER GRANTING PLAINTIFF’S**
MOTION FOR SUMMARY JUDGMENT- 8

1 for about three hours in an eight hour workday; and the ability to sit for about two
2 hours during an eight hour workday. (AR at p. 544). Turner indicated Plaintiff
3 needed to be able to shift at will from sitting or standing/walking (*Id.*), and that she
4 would be off task periodically throughout the workday, although Turner did not
5 specify how much. (AR at p. 545). Turner opined that although it was “possible”
6 Plaintiff could perform light work, sedentary work would be “ideal.” (*Id.*). Finally,
7 Turner indicated that if Plaintiff were currently attempting to work a 40-hour per
8 week schedule, she would on average miss two days a month due to her impairments.
9 (AR at p. 546). For reasons unknown, Water’s Edge pain clinic declined to fill out
10 the “Medical Report.” (AR at p. 646).

11 The ALJ gave “little weight” to Turner’s opinion, finding there was “no
12 support or explanation provided for her opinion.” (AR at p. 24). There was,
13 however, plenty of support for Turner’s opinion from her own treatment notes as
14 discussed above, in addition to the treatment notes from the pain clinic. According
15 to the ALJ, the record showed that Plaintiff “was doing well with controlled
16 symptoms” and that she “returned to working in childcare within a few months of this
17 evaluation, caring for two-year olds, which exceeds [her] less than sedentary
18 restrictions.” (*Id.*). The record which the ALJ cites in support of his assertion that
19 Plaintiff “was doing well with controlled symptoms” pertains to Plaintiff’s anxiety
20 symptoms (AR at pp. 526 and 556) and indeed, one of the reports (AR at p. 556) is
21 from November 2017, several months after the claimed closed period of disability.
22 Furthermore, it was actually six months from Turner’s January 2017 evaluation when
23 Plaintiff returned to work full-time in childcare. Moreover, without knowing the
24 physical demands of that job as actually performed, it is unclear whether it exceeded
25 the physical restrictions opined by Turner in January 2017.

26 The ALJ gave “significant” weight to the opinions of the state agency medical
27 evaluators who reviewed the record and concluded Plaintiff was capable of
28

1 performing light work with some restrictions. According to the ALJ, these evaluators
2 “reviewed the medical evidence of record and explained the basis of their opinions
3 which are consistent with the record.” (AR at p. 23). As noted above, the basis for
4 Turner’s opinions expressed in her January 2017 evaluation is apparent from her
5 treatment notes and the pain clinic treatment notes. Therefore, the court concludes
6 the ALJ did not provide germane reasons for discounting the physical RFC opinions
7 of Turner, Plaintiff’s treating PA-C, in favor of the opinions of non-examining
8 medical evaluators.

9 Plaintiff started counseling with Catholic Family & Child Service (CFCS) in
10 February 2016. She was diagnosed with generalized anxiety disorder and it was
11 recommended she undergo six weeks of cognitive behavioral therapy (CBT). (AR
12 at pp. 395-402).

13 In March 2016, upon referral from Turner, Plaintiff was seen for a psychiatric
14 evaluation by Laura DeCamp, Pharm. D., at Central Washington Comprehensive
15 Mental Health (CWCMH). Plaintiff indicated she discontinued services with CFCS
16 because she had a desire for medication management services which was unavailable
17 there. (AR at p. 417). Plaintiff reported she had been on anxiety medication since her
18 early 20s. (*Id.*). She scored 20 out of 21 on the GAD-7 Anxiety Questionnaire which
19 is statistically significant for severe anxiety. (AR at p. 419). DeCamp started the
20 Plaintiff on buspirone in addition to the other anxiety medications she was taking
21 which had been prescribed by PA-C Turner (escitalopram, clonazepam and
22 trazodone). (AR at p. 420).

23 Plaintiff’s therapist at CWCMH was Suzanne Damstedt who she saw on a
24 regular basis between May and December 2016 for therapy appointments, which were
25 in addition to Plaintiff’s regular medication management appointments at CWCMH.
26 (AR at pp. 417-459; 595-610). In January 2017, Damstedt completed a “Mental
27 Medical Source Statement” in which she opined Plaintiff was moderately limited in
28

**ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 10**

1 her ability to maintain attention and concentration for extended periods, and in her
2 ability to complete a normal work day and workweek without interruptions from
3 psychologically based symptoms and perform at a consistent pace without an
4 unreasonable number and length of rest periods. “Moderately limited” means unable
5 to perform the described mental activity for at least 20% of the work day up to 33%
6 of the work day. Damstedt also opined that Plaintiff was “severely limited” in her
7 ability to travel in unfamiliar places or use public transportation. “Severely limited”
8 means inability to perform the activity. According to Damstedt, Plaintiff would miss
9 on the average four or more days per month due to her mental impairment. Although
10 Damstedt indicated Plaintiff’s impairment would cause her to be off task periodically
11 throughout the workday, she did not specify the percentage. (AR at pp. 541-43).
12 Plaintiff expressed to Damstedt on more than one occasion that her anxiety was most
13 pronounced when it came to driving and that she would avoid driving because of it.

14 In July 2016, Plaintiff underwent a consultative psychiatric examination by
15 Kirsten Nestler, M.D.. Plaintiff informed Dr. Nestler she had difficulty driving
16 because of her anxiety and avoided driving whenever she could. (AR at p. 461). The
17 doctor diagnosed Plaintiff with an “[u]nspecified anxiety disorder.” (AR at p. 464).
18 According to the doctor:

19 The claimant states that anxiety is the main impediment to
20 her working at this time[,] but the only activity she stated
21 she avoided due to anxiety was driving. However, she drove
22 herself to [the] clinic today without any difficulty. I suspect
23 she is exaggerating her mental health symptoms. She did not
24 appear objectively depressed and appeared only mildly
25 anxious. She is taking Lexapro which may be helping her
26 anxiety and mood some. She did clearly state that she
27 left her last job of six years due to back pain rather than
28 anxiety. She displayed excellent interpersonal skills today
and did not seem to be severely impacted by anxiety at this
time. I suspect that she would be able to function in a
competitive work environment. Her problems are treatable
and she is likely to improve over the next 12 months. She is
currently starting outpatient psychotherapy and continuing
medication.

(AR at p. 464).

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 11

1 Dr. Nestler found that essentially Plaintiff suffered from no mental functional
2 limitations that would compromise her ability to work. (AR at pp. 464-65).

3 The ALJ gave significant weight to Dr. Nestler's opinion "because she
4 examined the Plaintiff and based her opinion on objective findings." (AR at p. 23).
5 The ALJ gave little weight to Damstedt's opinion on the basis that she "simply
6 checked boxes on a form and offered no support or explanation for her opinion."
7 (*Id.*). What the ALJ overlooked, however, was that Damstedt was obviously basing
8 her opinion on months of therapy sessions with Plaintiff and that opinion was
9 corroborated by months of medication management sessions at CWCMH. It was also
10 corroborated by Turner's treatment of Plaintiff for anxiety and panic attacks as
11 discussed above. (See also AR at pp. 510 and 514).³ Accordingly, the ALJ's reliance
12 on Dr. Nestler's opinion based on a one time examination, uncorroborated by
13 anything else in the record, cannot constitute a "germane" reason for rejecting the
14 opinion of Damstedt.⁴ Interestingly, however, Dr. Nestler's assertion that Plaintiff's
15 problems were treatable and likely to improve over the next 12 months was prescient
16 and correct as Plaintiff returned to full-time work in July 2017.

17 The ALJ did not provide "germane" reasons to reject either PA-C Turner's
18

19 ³ Plaintiff continued with regular treatment at CWCMH in 2017 through the
20 date on which she returned to full-time work (July 2017). (AR at pp. 548-592).

21 ⁴ As the ALJ noted, the non-examining state agency evaluators who
22 reviewed the record concluded Plaintiff's anxiety was not even a "severe"
23 impairment (AR at p. 23), a conclusion with which the ALJ did not agree.

24 Arguably, Dr. Nestler essentially concluded Plaintiff did not suffer from a
25 "severe" anxiety disorder.
26
27

28 **ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 12**

1 opinion regarding Plaintiff's physical RFC, nor therapist Damstedt's opinion
2 regarding Plaintiff's mental RFC.

4 **TESTIMONY RE SYMPTOMS AND LIMITATIONS**

5 Where, as here, the Plaintiff has produced objective medical evidence of an
6 underlying impairment that could reasonably give rise to some degree of the
7 symptoms alleged, and there is no affirmative evidence of malingering, the ALJ's
8 reasons for rejecting the Plaintiff's testimony must be clear and convincing. *Burrell*
9 *v. Colvin*, 775 F.3d 1133, 1137 (9th Cir. 2014); *Garrison v. Colvin*, 759 F.3d 95, 1014
10 (9th Cir. 2014). If an ALJ finds a claimant's subjective assessment unreliable, "the
11 ALJ must make a credibility determination with findings sufficiently specific to
12 permit [a reviewing] court to conclude that the ALJ did not arbitrarily discredit [the]
13 claimant's testimony." *Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002).
14 Among other things, the ALJ may consider: 1) the claimant's reputation for
15 truthfulness; 2) inconsistencies in the claimant's testimony or between her testimony
16 and her conduct; 3) the claimant's daily living activities; 4) the claimant's work
17 record; and 5) testimony from physicians or third parties concerning the nature,
18 severity, and effect of claimant's condition. *Id.*

19 The ALJ found Plaintiff's statements about the intensity, persistence, and
20 limiting effects of her symptoms were inconsistent because she reported improvement
21 in her symptoms with medications. (AR at p. 21). There is no doubt, as recounted
22 by the ALJ in his decision (AR at pp. 21-22), that Plaintiff's condition continued to
23 improve, ultimately resulting in her ability to return to full-time work. But this is not
24 a clear and convincing reason to reject Plaintiff's testimony that she was limited as
25 asserted by her and by PA-C Turner and therapist Damstedt during the closed period
26 at issue.

27 The ALJ found Plaintiff's failed work attempt at the Salvation Army in late
28

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 13

1 2015/early 2016, while not constituting substantial gainful activity, was inconsistent
2 with the limitations asserted by her. It was not inconsistent, however, and if anything,
3 supports Plaintiff's assertion about her limitations during the closed period at issue,
4 as corroborated by PA-C Turner and therapist Damstedt. Plaintiff quit after four
5 months at the job. She testified she was missing work a couple of times a week due
6 to back pain and anxiety (AR at pp. 41-42) which it was she also reported to CFCS
7 during her intake assessment in February 2016. (AR at p. 395).

8 The ALJ found Plaintiff's other daily activities were inconsistent with her
9 allegations of disabling symptoms. (AR at p. 22). "The Social Security Act does not
10 require that claimants be utterly incapacitated to be eligible for benefits . . . and many
11 home activities are not easily transferable to what may be the more grueling
12 environment of the workplace where it might be impossible to periodically rest or
13 take medication." *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). "[T]he mere fact
14 that a plaintiff has carried on certain daily activities, such as grocery shopping,
15 driving a car, or limited walking for exercise, does not in any way detract from
16 credibility as to her overall disability." *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th
17 Cir. 2001). Rather, "[i]t is only where the level of activity is inconsistent with a
18 claimed limitation that the activity has any bearing on credibility." *Id.* Daily
19 activities therefore "may be grounds for an adverse credibility finding if a claimant
20 is able to spend a substantial part of h[er] day engaged in pursuits involving physical
21 functions that are transferable to a work setting." *Orn v. Astrue*, 495 F.3d 625, 639
22 (9th Cir. 2007). To conclude that a claimant's daily activities warrant an adverse
23 credibility determination, the ALJ must make specific findings relating to the daily
24 activities and the transferability of the activities to the workplace. *Id.*

25 The activities cited by the ALJ- watching television, cooking, grocery
26 shopping, driving periodically, exercising- are not inconsistent with Plaintiff's
27 asserted limitations during the closed period at issue. Indeed, Plaintiff's increasing
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 14**

1 of her driving time in September 2016 and January 2017, increasing of her exercise
2 time in February and March 2017, and her beginning of part-time work at the
3 childcare center in April 2017, where she would ultimately start full-time work in July
4 2017, is entirely consistent with the gradual improvement in her symptoms as testified
5 to by the Plaintiff and corroborated by her treating medical providers.

6 The ALJ did not provide “clear and convincing” reasons for discounting
7 Plaintiff’s testimony regarding her symptoms and the extent of her physical and
8 mental limitations during the closed period at issue.

9 10 **REMAND**

11 Social security cases are subject to the ordinary remand rule which is that when
12 “the record before the agency does not support the agency action, . . . the agency has
13 not considered all the relevant factors, or . . . the reviewing court simply cannot
14 evaluate the challenged agency action on the basis of the record before it, the proper
15 course, except in rare circumstances, is to remand to the agency for additional
16 investigation or explanation.” *Treichler v. Commissioner of Social Security*
17 *Administration*, 775 F.3d 1090, 1099 (9th Cir. 2014), quoting *Fla. Power & Light Co.*
18 *v. Lorion*, 470 U.S. 729, 744, 105 S.Ct. 1598 (1985).

19 In “rare circumstances,” the court may reverse and remand for an immediate
20 award of benefits instead of for additional proceedings. *Id.*, citing 42 U.S.C. §405(g).
21 Three elements must be satisfied in order to justify such a remand. The first element
22 is whether the “ALJ has failed to provide legally sufficient reasons for rejecting
23 evidence, whether claimant testimony or medical opinion.” *Id.* at 1100, quoting
24 *Garrison v. Colvin*, 759 F.3d 995, 1020 (9th Cir. 2014). If the ALJ has so erred, the
25 second element is whether there are “outstanding issues that must be resolved before
26 a determination of disability can be made,” and whether further administrative
27 proceedings would be useful. *Id.* at 1101, quoting *Moisa v. Barnhart*, 367 F.3d 882,

28 **ORDER GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT- 15**

1 887 (9th Cir. 2004). “Where there is conflicting evidence, and not all essential factual
2 issues have been resolved, a remand for an award of benefits is inappropriate.” *Id.*
3 Finally, if it is concluded that no outstanding issues remain and further proceedings
4 would not be useful, the court may find the relevant testimony credible as a matter of
5 law and then determine whether the record, taken as a whole, leaves “not the slightest
6 uncertainty as to the outcome of [the] proceedings.” *Id.*, quoting *NLRB v. Wyman-*
7 *Gordon Co.*, 394 U.S. 759, 766 n. 6 (1969). Where all three elements are satisfied-
8 ALJ has failed to provide legally sufficient reasons for rejecting evidence, there are
9 no outstanding issues that must be resolved, and there is no question the claimant is
10 disabled- the court has discretion to depart from the ordinary remand rule and remand
11 for an immediate award of benefits. *Id.* But even when those “rare circumstances”
12 exist, “[t]he decision whether to remand a case for additional evidence or simply to
13 award benefits is in [the court’s] discretion.” *Id.* at 1102, quoting *Swenson v.*
14 *Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989).

15 The ALJ failed to provide legally sufficient reasons for rejecting PA-C
16 Turner’s opinion that Plaintiff was limited to sedentary work. As all of Plaintiff’s
17 past relevant work, as testified to by the VE, involved light work (AR at pp. 49-50),
18 Plaintiff was unable to perform that work during the closed period at issue.

19 Asked by the ALJ about the availability of work to an individual who is absent
20 from work twice a month, including days on which the individual is tardy or leaves
21 work early, the VE testified no work would be available. (AR at p. 51). Therapist
22 Damstedt opined Plaintiff would, on average, miss four or more days of work per
23 month due to her anxiety and panic attacks. PA-C Turner opined Plaintiff would, on
24 average, miss two days of work per month. As discussed above, the ALJ did not
25 provide legally sufficient reasons for rejecting either Damstedt’s or Turner’s opinion.

26 There are no outstanding issues that must be resolved, and there is no question
27 the Plaintiff is disabled. Accordingly, the court will depart from the ordinary remand
28

ORDER GRANTING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT- 16

1 rule and remand for an immediate award of benefits.

2
3 **CONCLUSION**

4 Plaintiff's Motion For Summary Judgment (ECF No. 13) is **GRANTED** and
5 Defendant's Motion For Summary Judgment (ECF No. 14) is **DENIED**.

6 Pursuant to sentence four of 42 U.S.C. §405(g) and § 1383(c)(3), this matter
7 is **REMANDED** for immediate payment of disability benefits to the Plaintiff for the
8 period from September 1, 2015 to July 4, 2017.

9 **IT IS SO ORDERED.** The District Executive shall enter judgment
10 accordingly, forward copies of the judgment and this order to counsel of record, and
11 **close the case.**

12 **DATED** this 24th day of October, 2019.

13
14 *s/Lonny R. Suko*

15 _____
16 LONNY R. SUKO
17 Senior United States District Judge
18
19
20
21
22
23
24
25
26
27
28

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT- 17**